IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT J. D. STRONG, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-PJC**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE REGARDING POULTRY WATER QUALITY HANDBOOK (Dkt. # 2396)

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Reply in Support of its Motion in Limine Regarding Poultry Water Quality Handbook (Dkt. ##2396, 2437) and in opposition to Plaintiffs' Response thereto (Dkt. #2505), requesting the Court to exclude the evidence, testimony, references, attorney statements, arguments as discussed Peterson's opening brief and as further discussed herein. In support of its Motion, Peterson states and shows the Court as follows:

I. The Poultry Water Quality Handbook is not an admission under Rule 801(d)(2)

Plaintiffs have repeatedly used the *Poultry Water Quality Handbook* (the Handbook) throughout these proceedings to offer into the record the putative truth of the matter asserted

therein. The occasions on which Plaintiffs' counsel has read extended portions of the Handbook into the record and then asked the witness whether selection is true or correct number in the dozens, if not hundreds, for example:

> "Let's look at page 630 of the Poultry Water Quality Handbook. There it says – if I can find the place. Under the heading Nutrients and Salts, 'Poultry manure is a valuable nutrient for grain and fiber crops, forage crops, fruit, and vegetable. However, if manure, litter, dead birds (as compost or as buried carcasses) and/or wastewater are not properly protected and utilized, water contamination can occur from the release of excess nitrogen and phosphorous into the environment.' *Do you agree with that statement?*" Ex. 1, Houtchens Depo. at 67 (emphasis added).

> "Mr. Houtchens, I want to direct your attention to one more reference in the Water Quality Handbook that Peterson provided its growers. On page 644, about the third or fourth paragraph down it says, 'Phosphorous.' . . . It says, 'Phosphorous-laden soil or dissolved phosphorous can move via runoff into the rivers, lakes and streams, where it causes excessive plant and algae growth, which in turn depletes the dissolved oxygen content in the water. Phosphorous-enriched waters contribute to fish kills and the premature aging of the waterbody. In the end, the beauty and the use of the waters are seriously curtailed. Even relatively small soil loss may result in significant nutrient depositions in water. . . . *Do you agree with statement I just read from the Water Quality Handbook?*" Ex. 1, Houtchens Depo. at 73-74 (emphasis added).

In each case, Plaintiffs seek affirmation of the truth of the matter asserted in the Handbook, presumably as circumstantial evidence of their claims against Peterson.[1] *Cf. United States v. Jefferson*, 925 F.2d 1242, 1252-53 (10th Cir. 1991) (noting determination of admissibility of hearsay is not dependent of whether the statement is offered as direct or circumstantial evidence). Yet, incredibly, Plaintiffs contend that the Handbook is not a repository of hearsay, simply because a former executive of Peterson placed a cover letter on the Handbook before distributing copies of it as an educational aid.

[1] Notably, were this type of testimony admissible evidence, the Handbook is not specific to any particular watershed, thus, lacking any probative value to Plaintiffs' claims in this lawsuit. Moreover, to the extent Plaintiffs have designated such deposition testimony for use at trial, Peterson has made separate objections to the designations, which it incorporates by reference here.

Plaintiffs' contention does not reconcile with the substance of the applicable evidentiary rule. Under Federal Rule of Evidence 801, a "statement" is defined as "an oral or written assertion . . . if it is intended by the person as an assertion." Fed. R. Evid. 801(a). Thus, the subject statement must be *intended* by the party as an assertion of the content of the statement. *See Grundberg v. Upjohn Co.*, 137 F.R.D. 365, 370 n.7 (D. Utah 1991). This element of intent necessarily is included in the various provisions and subcategories of Rule 801(d)(2).[2] The fact that a party's name may appear on the document is not conclusive as to the admission issue. *See Jefferson*, 925 F.2d at 1252-53, *accord Grundberg*, 137 F.R.D. at 370 (noting that possession of a document is not necessarily an adoption of it) (citing *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981)). In each of the cases relied upon by Peterson and cited by Plaintiffs, unlike the instant case, the party-opponent manifested the requisite intent by using the subject document in such a way that the assertion of its content was without question.

For example, in *Wagstaff*, the party-opponent, who had reprinted the newspaper articles, intended to assert the content of the articles to persuade the recipient of them to enter into a transaction based on the assertions of fact made therein. *See Wagstaff v. Protective Apparel Corp. of Am., Inc.*, 760 F.2d 1074, 1078-79 (10th Cir. 1985). In *Grundberg*, the party-opponent submitted protocol reports to the Food and Drug Administration for purposes of new drug approval, intending to assert the facts contained in the reports in partial satisfaction of that process. *Grundberg*, 137 F.R.D. at 369-70. Likewise, in the *Pfizer* case, "Pfizer manifested an adoption or belief in the truth in the affidavits by relying on them in the briefs it submitted to the European Patent Office" in support of its patent application, intending to assert the facts

[2] Of note, legal conclusions, such as many of those contained within the Handbook, cannot be admissions under Rule 801(d)(2). *Pfizer, Inc. v. Teva Pharma. USA, Inc.*, 2006 WL 3041102, at *4 (D.N.J. Oct. 26, 2006) (citing *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956)).

contained in the subject documents. *Pfizer, Inc.*, 2006 WL 3041102, at *4-5. In each instance, the declarant, as opposed to the proponent of the statement, offered it for the truth of the matter asserted in the respective documents.

In this case, these types of unambiguous assertions do not exist with regard to the Handbook. Indeed, the uncontroverted evidence establishes that no one—whether sending or receiving the Handbook—ever read the Handbook, ever relied on the Handbook or ever intended others to rely on the Handbook. *See* Dkt. # 2396 at 3, and exhibits cited therein. Mr. Henderson's contention that the Handbook contained the "most up-to-date information" is not alone an assertion or endorsement of anything in the Handbook. [3] Instead, the Handbook was provided to Peterson's former contract growers as a resource to aid them in the management of their operations. Plaintiffs contend that "Peterson used and sought to benefit from the [Handbook]," *see* Dkt. # 2505 at 4, but they fail to cite a single example supporting their *ipse dixit* contention. In absence of such evidence, the uncontroverted truth remains that Peterson did not intend to assert the content of the Handbook and that the former growers could use it or not use it, at their sole discretion. As such, the Handbook is not an admission on the part of Peterson and, further, remains inadmissible hearsay.

[3] By analogy, the fact that a former executive of Peterson placed a cover letter on the Handbook and distributed it to Peterson's former contract growers, without more, is not an adoption of any portion of the Handbook anymore than were Rush Limbaugh to place a cover letter on H.B. 3200 ("America's Affordable Health Choices Act of 2009") distributing it to his audience with commentary that it is the latest information on healthcare reform and that they should use it as they see fit. Nonetheless, under Plaintiffs' overly broad interpretation of Rule 801(d)(2), Mr. Limbaugh would be endorsing and adopting the House Bill as his own. Clearly, the proposition is absurd. The hypothetical statement in the analogy is not intended to be assertions of the content of H.B. 3200. Likewise, in the instant case, Plaintiffs have not cited any evidentiary materials demonstrating an assertion by Peterson regarding the content of the Handbook.

II. The Poultry Water Quality Handbook is not a statement against interest

Besides failing to demonstrate that the Handbook amounts to an admission of party-opponent, Plaintiffs have failed to demonstrate the admissibility of the Handbook as a statement against interest under Federal Rule of Evidence 804(b)(3). In this regard, Plaintiffs contend that the statement is Dan Henderson's statement, and not Peterson's statement. They further contend that Mr. Henderson is unavailable at the time of trial because, as discussed in Plaintiffs' Response in Opposition to Peterson's Motion in Limine Regarding Former Employees (Dkt. #2474), the ordinary, usual and shortest route of travel between Mr. Henderson's residence and the courthouse exceeds 100-miles. *See* Dkt. #2505 at 6. However, internet-based driving directions are not the appropriate measure of distance under any of the federal rule, whether pertaining to procedure or evidence. See JOHN KIMPFLEN ET AL., 10A FEDERAL PROCEDURE § 26:518 (noting distance for FRCP 32(a)(4)(B) is measured using a straight line approach); *SCM Corp. v. Xerox Corp.*, 76 F.R.D. 214, 215-16 (D. Conn. 1977) (noting that the distances under Federal Rules of Civil Procedure 4, 32 and 45 are all determined using a "straight line measurement"); *accord Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 730 (10th Cir. 2006) (noting distances under Federal Rule of Civil Procedure 4 are measured "as the crow flies"). Using the proper straight line method to measure distance, Mr. Henderson's residence is within 100-miles of the courthouse. *See* Ex. 2, 100-mile radius map; Ex. 3, Henderson Depo. at 7:9-23. As such, Mr. Henderson is available to testify at trial, precluding use of the Handbook at trial as a statement against interest.

Although moot because Mr. Henderson's is amenable to the Court's subpoena power, *see* Ex. 3, Henderson Depo. at 7:9-23, Plaintiffs also incorrectly contend that they possess "corroborating evidence" regarding the Handbook. *Cf. United States v. Porter*, 881 F.2d 787,

882 (9th Cir. 1989) (requiring proponent of Rule 804(b)(3) evidence to demonstrate unavailability of the declarant and reliability of the purported statement against interest). While Plaintiffs cite two possible witnesses who could testify about the Handbook, they do not provide the Court with any citations to the record where either of these witnesses provide any testimony regarding the purportedly reliability of the any statement in the Handbook, which Plaintiffs are attributing to Peterson. Thus, the record provided by Plaintiffs is silent on the reliability prong of the admissibility inquiry. As such, were Mr. Henderson unavailable (which he is not), Plaintiffs have nonetheless failed to demonstrate that Handbook is admissible as a statement against interest.

III. The Poultry Water Quality Handbook is not a learned treatise

Plaintiffs contend that it is too early to disqualify the Handbook as a learned treatise under Federal Rule of Evidence 803(18). In doing so, they suggest that they may offer a witness at trial to qualify the Handbook as a learned treatise. As with all the evidence subject to the various Motions in Limine, Plaintiffs bear the burden of establishing the admissibility of the Handbook as a learned treatise, if that is the way they anticipate offering it into evidence. *See Maggipinto v. Reichman*, 481 F. Supp. 547, 550 (E.D. Pa. 1979). Notably, however, Plaintiffs have not directed the Court to any *expert* witness, see Fed. R. Evid. 803(18) ("[t]o the extent called to the attention of an expert witness"), on their witness list who has opined or could opine on whether the Handbook, which is compilation of unidentified materials that have not been updated for at least a decade, is a "reliable authority" on one of the identified subject matters in Rule 803(18).[4] Moreover, in their Response brief, Plaintiffs never actually claim the Handbook is

[4] Plaintiffs argue that, because their expert witness Robert Taylor references the Handbook once in his expert report to support his opinion that water quality issues have been at the "forefront of economic and scientific dialog" since the 1970s, he can qualify the Handbook as a learned treatise and testify to the entire content of it. However, Dr. Taylor's purported expertise is

a learned treatise. Thus, the Handbook should not be offered into evidence at trial under the learned treatise exception to the hearsay rule.

IV. The Poultry Water Quality Handbook does not fit within other hearsay exceptions

Plaintiffs suggest that, if the Handbook does not fit within any of the other exceptions to the hearsay rule, which it does not, it is nonetheless admissible as either as a business record, *see* Fed. R. Evid. 803(6), or as a government document, *see* Fed. R. Evid.803(8). These contentions are spurious.

Regarding the business record contention, the unsubstantiated allegation that the Handbook and the related cover letter "were documents created and maintained in the course of regularly conducted business activities" is not enough to establish admissibility under Rule 803(6), which requires, in pertinent part, that the purported business record meet the following requirements:

> [1] A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, [2] made at or near the time by, or from information transmitted by, [3] a person with knowledge, [4] if kept in the course of regularly conducted business activity, *and* [5] if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian or other qualified witness* . . . .

Fed. R. Evid. 803(6) (emphasis added). Plaintiffs bear the burden to establish that the Handbook satisfies all of these requirements, *see Cobbins v. Tennessee Dept. of Transp.*, 566 F.3d 582, 588 (6th Cir. 2009) (discussing proponent's burden to establish elements of admissibility of purported business record), and Plaintiffs have not done so either in their Response or in the evidence

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limited to agricultural economics. Thus, at best, Dr. Taylor could only testify as to the Handbook's acceptance as a learned treatise in the economic community and only read those portions of the Handbook into the record at trial. *See* Fed. R. Evid. 803(18). Of note, in his expert report, Dr. Taylor does not suggest that the Handbook has any value as a learned treatise of agricultural economics, thus, amounting to new, previously undisclosed opinions were he to attempt to endorse the Handbook at trial.

developed during the course of discovery. Although Plaintiffs cite some record evidence in support of their argument,[5] they have not referred the Court to any evidence that the subject documents satisfy either the temporal requirement or the "person with knowledge" requirement of the hearsay exceptions. Accordingly, Plaintiffs have failed to establish that the Handbook is a Rule 803(6) business record.

Likewise, Plaintiffs have not—and cannot—establish that the Handbook, which was developed by the Poultry Water Quality Consortium, is a public record, and they have not directed the Court to any authority which supports the incredible proposition that a private organization, such as the Consortium, can be a public office or agency required under Federal Rule of Evidence 803(8). Similarly, they cannot reasonably contend that the Handbook was developed "pursuant to duty imposed by law" or any of the other alternative requirements in Rule 803(8). Indeed, Plaintiffs cannot, and do not attempt to, reconcile the incompatible positions taken in their Response, wherein they rely on the testimony of an employee of the *private trade organization* U.S. Poultry and Egg Association to purportedly authenticate the Handbook, with their contentions that the Handbook is a public record. As such, Plaintiffs have not established the admissibility of the Handbook as a public record under Rule 803(8).

V. The Poultry Water Quality Handbook should be excluded under Rule 403

Finally, notwithstanding the foregoing, Plaintiffs nonetheless contend that the Handbook is admissible for purposes of demonstrating Peterson's purported knowledge "that the practice of

[5] This cited deposition testimony does not establish that the Handbook is admissible as a business record. At no point in the deposition of Don Dalton, the individual from the U.S. Poultry and Egg Association, deposed by Plaintiffs in an attempt to authenticate the Handbook, did he testify in either form or substance that the Handbook was "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge." Moreover, the fact that Jim Pigeon, a former grower and employee of Peterson, had a copy of the Handbook in his *personal* possession, producing it to Plaintiffs under a subpoena served on him, hardly establishes that Peterson maintained the document in the manner required under Rule 803(6).

land-applying poultry waste in the IRW has been causing and is continuing to cause a nuisance and trespass." *See* Dkt. #2505 at 5. Without saying as much, Plaintiffs are clearly contending that the Handbook is pertinent to their *Restatement (Second) of Torts* § 427B theory. However, the Handbook does not support Plaintiffs' theory that the land application of litter *always*, or ever, causes any water quality issue when it is properly managed. Thus, as explained in Peterson's opening brief, the Handbook should be excluded from evidence under Rule 403.

For example, as discussed in Peterson's Response to Plaintiffs' Motion for Partial Summary Judgment, the Handbook contains, *inter alia*, the following quotations, which are contrary to Plaintiffs' contention, to wit:

> "[P]roperly managed poultry wastes from manure, litter, dead birds, and wastewater are profitable farm investments. . . . Products derived from wastes will reduce chemical fertilizer costs, improve soil quality, and protect water resources, air quality, and human health."
>
> "Pollution is Not Inevitable – Poultry growers, whether their operation is consolidated or diversified need not produce any pollution outside the system."
>
> "Land application, especially field spreading, is in most cases the best use of poultry wastes. It recovers nutrients that would otherwise be lost, improves yield, and reduces the possibility of releasing this material to water and environment. . . . Nutrient management planning as a preliminary to land application has become a standard practice for recovering and using the nutrients in solid and liquid waste."

See Dkt. # 2145 at 13-14, and exhibits cited therein.

As is evident from the foregoing quotations, the Handbook does not support Plaintiffs' theory of their case, whether in regard to Peterson's purported knowledge or otherwise. With regard to knowledge of alleged injury, the above quotes from the Handbook directly refutes Plaintiffs' 427B-driven contention that every, or any, land application of poultry litter is a nuisance. Plaintiffs must also concede that the Handbook is not specific to the IRW, does not contain any description of Peterson's former contract growers or their respective operations and

addresses issues beyond poultry litter, including but not limited to other animal manures, poultry processing and other agricultural practices. None of this purported "knowledge" is probative of what was known or should have been known by Peterson, regarding activities in the IRW.

Nonetheless, as demonstrated by Plaintiffs' "do you agree" inquiries regarding the Handbook, *see* Part I, *supra*, at 2, Plaintiffs have attempted to use the Handbook as a short cut for their burden of proof at trial, suggesting that general principles contained in the Handbook applies without exception to every litter application occurring within the IRW. Indeed, Plaintiffs have mischaracterized the content of the Handbook, much as they have mischaracterized Peterson's relationship to it. Every statement that Plaintiffs pull from the Handbook can be controverted by other statements from the Handbook, such as those quoted above, requiring a trial within a trial—i.e., a needless waste of time—on the content of the Handbook, which does not have any specific applicability to the issues alleged in the IRW. Plaintiffs also have not bothered to develop direct evidence linking the Handbook to their specific allegations against Peterson in this matter. Nonetheless, Plaintiffs would have the fact finder assign liability to Peterson based on these general principles, without evidence that they apply to any of the operations formerly associated with Peterson in the IRW. Regardless of how Plaintiffs choose to characterize this practice, it is an improper basis on which to establish Peterson's purported liability. Accordingly, the Handbook should be excluded from evidence under Rule 403 and for the other reasons discussed herein and in Peterson's opening brief.

VI. Conclusion

For the reasons stated herein, Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the foregoing categories of evidentiary materials, including any and all testimony, references, attorney statements or arguments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 1st day of September, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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